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Nos. 84-816, 84-824, 84-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, *et al.*,
Respondents.
(and two related petitions)

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

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RULE 28.1 LISTING

American Telephone and Telegraph Company, which has no parent company, retains a minority interest in Cincinnati Bell Inc., which has outstanding securities in the hands of the public.[1]

[1] Counsel for AT&T understand Rule 28.1 to require disclosure of only those subsidiaries or affiliates with outstanding securities in the hands of the public.

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BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

Pursuant to Rule 22.1 of the Rules of this Court, respondent American Telephone and Telegraph Company ("AT&T") opposes the petitions for certiorari filed by the Public Service Commission of Wisconsin, the State of Michigan, and the Michigan Public Service Commission (No. 84-816); the Florida Public Service Commission

(No. 84-824); and the New York State Department of Public Service (No. 84-856). The petitions seek review of the same judgment of the Court of Appeals. See Sup. Ct. R. 19.4.

STATEMENT OF THE CASE

In these three petitions for certiorari, four states join the National Association of Regulatory Utility Commissioners ("NARUC") and the National Association of State Utility Consumer Advocates ("NASUCA") in seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1] That judgment upheld, in all but minor respects, the FCC's access charge plan—a series of FCC orders establishing a new rate structure for interstate rates to recover the interstate costs of local telephone companies in originating and terminating interstate calls. See Pet. App. 27a-32a.[2]

The pertinent factual background, and the nature of the FCC's access charge plan, are set forth in AT&T's brief in opposition to NARUC's petition in No. 84-95; to avoid repetition, that statement is incorporated by reference here. However, it may be useful to the Court for this opposition to identify clearly the aspects of the access charge plan assailed by all five petitions; to relate the claims made in the various petitions to one another; and to apprise the Court of supplementary proceedings at the FCC following the access charge plan orders that the petitions seek to have reviewed on certiorari.

Under the FCC's access charge plan, local telephone companies are compensated for their interstate costs through a range of interstate charges. These include

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[1] NARUC's petition was filed in July 1984 (*NARUC* v. *FCC*, No. 84-95); NASUCA's petition was filed in September 1984 (*NASUCA* v. *FCC*, No. 84-504). AT&T has filed oppositions in both cases.

[2] "Pet. App." refers to Appendix A to NARUC's petition in No. 84-95.

charges to interexchange companies like AT&T, who require switching and other services from the local companies, and charges to end users who employ the same local company facilities to access both the exchange and interstate networks. In general, the access charge plan does not fix the individual charges but rather determines the structure of the interstate rates that the local companies are to file with the FCC. When filed, those charges are themselves subject to agency review.

Pursuant to the access charge plan orders, certain of the charges contemplated by the FCC have gone into effect [3] and are currently under review in pending Commission proceedings.[4] The structure for other charges, including the fixed end user charges for single-line businesses and for residential service, is still being developed in FCC proceedings that are not yet completed.[5] When those rate structure proceedings are completed, the additional charges will be reflected in tariffs that will themselves be subject to review by the FCC and ultimately review in the courts.

In the Court of Appeals, a wide array of attacks was made on the access charge plan by numerous petitioners or intervenors including carriers, end users, and states. All of the central criticisms were rejected in an extraordinarily

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[3] End user charges for multiline business customers, which may not exceed $6 per month, went into effect in May 1984, as did various charges paid by interexchange carriers.

[4] *Investigation of Access and Divestiture Related Tariffs*, FCC Docket No. 83-1145.

[5] Tariffs setting end user charges for residential customers and single-line businesses will not be filed until next year. A recently adopted FCC order establishes a general ceiling on per-line charges for residential users of $1 per month at the outset (rising to $2 in June 1986), subject to variations adapted to local circumstances and an exemption mechanism for customers who cannot afford such payments. *In re MTS and WATS Market Structure*, FCC Docket No. 78-72, adopted Dec. 19, 1984. This order not been reviewed by the Court of Appeals and is not the subject of any of the pending petitions.

thorough and detailed decision by the Court of Appeals. Pet. App. 1a-110a. In this Court, only five certiorari petitions have been filed, and all of them are addressed to only one aspect of the FCC's multifaceted access charge plan: the use of fixed interstate end user charges to recover a portion of the interstate costs of local telephone companies assigned to the interstate jurisdiction.

From the outset, the principal challenge by the states to the end user charges has been a claim that they are precluded by this Court's decision in *Smith* v. *Illinois Bell Telephone Company*, 282 U.S. 133 (1930), and by the "intrastate service" exemption of Section 2(b)(1) of the Communications Act, 47 U.S.C. § 152(b)(1). Those contentions were answered in AT&T's brief in opposition in No. 84-95; and, so far as the new petitions addressed in this opposition repeat those arguments, AT&T's brief in No. 84-95 is adopted by cross-reference.[6] The NASUCA certiorari petition in No. 84-504 raised a procedural claim—that oral hearings were required for the access charge plan—which AT&T answered in its opposition in No. 84-504 and which is not repeated by any of the new petitions.

The new certiorari petitions appear to raise three new sets of arguments. First, the Wisconsin-Michigan petition, supported in part by the New York petition, argues that the interstate access charges violate the "connecting carrier" exemption of Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2). Next, the Florida petition contends that the end user charge is unlawfully discriminatory and is in any event unwise as a matter of

[6] The *Smith* argument, principally relied upon by NARUC, is undercut by the Wisconsin-Michigan certiorari petition. That petition appears to argue that the lower court read *Smith* correctly but that *Smith* itself "ceased to have controlling authority under the Communications Act" as a result of the Bell System divestiture. Pet. 12-13. See pp. 13-14, below.

policy. Finally, the Wisconsin-Michigan petition, supported by the New York petition, asserts that the pendency of a number of other cases involving different disputes over FCC authority supports certiorari in this case.

SUMMARY OF ARGUMENT

The certiorari petitions filed by Wisconsin-Michigan and by New York make a new claim: that the FCC lacked jurisdiction to require fixed interstate end user charges to recover interstate costs. Both argue that such end user charges are prohibited by Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2), limiting FCC jurisdiction over so-called "connecting carriers." However, an explicit proviso in Section 2(b)(2) makes clear that, even as to connecting carriers, the FCC retains jurisdiction to require reasonable interstate rates. Accordingly, Section 2(b)(2) is no bar to the end user charges, whether or not individual local telephone companies are deemed to be connecting carriers.

Florida, unlike the other petitioners, challenges the merits of the end user charges, but its claims do not warrant certiorari. The FCC amply supported the determinations and findings that are challenged by Florida, and no claim of conflict between the circuits has been or could be made concerning the merits of the plan. Finally, the Wisconsin-Michigan and New York petitions assert that a number of *other* pending or prospective cases in this Court involve questions of FCC authority; but the prospect or possibility of review by this Court of other issues of FCC authority, not presented by the access charge plan or the decision below affirming it, provides no reason for review in this case.

ARGUMENT

I. The Use of Interstate End User Charges To Recover Interstate Costs Does Not Violate Section 2(b)(2) of the Communications Act.

In several respects, the new petitions challenge the FCC's authority to set fixed end user charges by repeating arguments made in the NARUC certiorari petition and already answered in AT&T's brief in opposition.[7] However, two of the petitions—Wisconsin-Michigan (Pet. 12-13) and New York (Pet. 7-8)—do offer one new jurisdictional argument. They claim that Section 2(b)(2) of the Communications Act, limiting FCC authority over "connecting carriers,"[8] forbids the FCC from requiring such carriers to set interstate end user charges; and in particular these states argue that this limitation curtails the FCC's power to mandate such charges for the former Bell System Operating Companies ("BOCs") which the states contend are now "connecting carriers" as a result of their divestiture from AT&T.

As the Court of Appeals observed (Pet. App. 43a-44a, n.23), the answer to this argument is provided by the explicit language of Section 2(b)'s final proviso.

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[7] These claims include NARUC's argument that the charges violate Section 2(b)(1) of the Act because they are allegedly charges for "local" service (answered at AT&T's brief in opposition in No. 84-95 at pp. 8-11), and NARUC's argument that such charges violate Section 221(b) of the Act, 47 U.S.C. § 221(b) (answered at AT&T's brief at p. 8 n.8).

[8] Section 2(b)(2) provides, with qualifications not here relevant, that the Act does not apply to or give the FCC jurisdiction over a carrier "engaged in interstate . . . communications solely through physical connection with the facilities of another carrier," "except that sections 201 to 205 of [the Act] shall, except as otherwise provided therein, apply to [such] . . . carriers." Elsewhere the Act classifies such Section 2(b)(2) carriers as "connecting carriers." Section 3(u), 47 U.S.C. § 153(u).

Although Section 2(b)(2) does in certain respects restrict FCC authority over connecting carriers, Section 2(b) concludes by providing "that sections 201 to 205 of [the Act] shall, except as otherwise provided therein, apply to [such connecting] . . . carriers." See p. 6, n.8, above. In other words, connecting carriers are not automatically subject to a variety of ancillary provisions of the Act, but they continue to be subject to most of the core requirements of Sections 201-05, 47 U.S.C. §§ 201-05, *including* the power of the FCC to order them to charge reasonable rates under Section 205(a) of the Act, 47 U.S.C. § 205(a).[9]

The FCC's determination of the interstate rate structure, including fixed interstate end user charges, is an exercise of the FCC's authority under Section 205(a) of the Act. Pet. App. 43a-44a, n.23. Whether or not an individual telephone company is classified as a connecting carrier is irrelevant because, under Section 2(b)'s proviso, the FCC retains power over such carriers to require them to establish reasonable interstate rates. There is no conflict on this issue with the decision of any other court.

The petitions argue that connecting carriers are exempt from the requirement of Section 203(a), 47 U.S.C. § 203(a), that charges for interstate service be reflected in tariffs filed with the FCC. This provision shifts the mechanical obligation to file tariffs covering a connecting carrier by requiring that the interstate carrier with which the connecting carrier connects shall file tariffs reflecting charges for itself "and its connecting carriers" for interstate service. Section 203(a). It does not qualify the FCC's power under Section 205(a) to require *all* carriers,

[9] Section 205(a) implements the requirements of Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b), 202(a), that interstate rates be just, reasonable, and not unreasonably discriminatory. None of these provisions contains any internal exemption excluding connecting carriers from their requirements.

including connecting carriers, to maintain interstate rates that are reasonable and not unreasonably discriminatory. Thus, even if Section 203(a) precluded the FCC from requiring tariff filings by connecting carriers—which it does not—those carriers would still have to employ the fixed end user charges that the FCC has found to be appropriate under Section 205(a).[10]

Furthermore, the District of Columbia Circuit ruled in an earlier case that the FCC does have discretionary authority to require connecting carriers to file tariffs for interstate services. Even though Section 203(a) does not automatically command such filings by connecting carriers, the FCC has been held to have general authority to require such carriers to file tariffs for interstate services.[11] No conflict exists with respect to the power of the FCC, on a discretionary basis, to require the filing of tariffs by all local telephone companies where interstate services are involved.

In sum, the FCC clearly has authority under the Act to establish interstate end user charges to be collected by local telephone companies even if it is assumed that some individual companies are connecting carriers under Section 2(b)(2). The "connecting carrier" exemption relied on by the new petitions, like the "intrastate service" exemption relied on by NARUC, is irrelevant to this case. The FCC's exercise of its authority over interstate rates is consistent with the language of the Act and all existing case law, and the issue of FCC authority is plainly not one on which certiorari is warranted.

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[10] Because all carriers are subject to Section 205(a), the FCC had no occasion to determine in this case the "connecting carrier" status of any local telephone company, nor did the lower court address that subject.

[11] *Lincoln Tel. & Tel. Co.* v. *FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (construing Section 4(i) of the Communications Act, 47 U.S.C. § 154(i)). Section 203(a) does not forbid the FCC to require the filing of tariffs by connecting carriers; it merely exempts them from an automatic statutory filing requirement.

II. Florida's Attacks on the Merits of the Fixed End User Charges Do Not Merit Certiorari.

In its petition, Florida makes two attacks on the merits of the fixed interstate end user charges. Although it now argues that the end user charges are discriminatory, Florida did not make this argument in the lower court and the Court of Appeals did not pass upon it. Florida did argue below that the use of flat end user charges threatened universal service and the lower court correctly rejected that argument. Neither contention presents any conflict in the circuits or otherwise warrants certiorari.

Florida's first claim is that the use of a uniform end user access charge is "discriminatory" because the actual interstate non-traffic sensitive costs, covered in part by such charges, vary from place to place. From this premise, Florida argues that the fixed end user charges therefore bear "no relationship to actual cost" (Pet. 17) and concludes that the charges therefore constitute forbidden discrimination in rates under Section 202(a). *Id.* Florida is incorrect as to both its description of the end user charge and the law governing discrimination under the Communications Act.

As the Court of Appeals made clear, there is no statutory requirement that every charge reflect the precise cost of the individual user. *E.g.*, Pet. App. 59a, 83a, 92a. On the contrary, "averaged" charges have been utilized for years in telephone rate making even though the precise cost of providing a service to an individual customer may vary for virtually every customer. Merely as an example, many jurisdictions have used flat monthly exchange charges for local residential service; but the cost of serving each individual customer varies significantly depending on distance of the house from the central office, the number of local calls made each month, and several other factors. Under Florida's theory, all such flat local charges would constitute unreasonable discrimination.

In any event, Florida is wrong in suggesting that the end user charges are required to be uniform under the FCC's access charge plan: The agency is establishing *caps* for different classes of end user charges. Within the framework of the rate structure established by the FCC, the end user charges filed by different companies can and do vary from area to area. Indeed, the end user charges in different jurisdictions for multiline businesses range from under $3 up to the $6 ceiling. Similarly, the recently adopted proposals for residential charges would permit local variations. See p. 3, n.5, above. The lawfulness of individual charges is not at issue in this case,[12] but these facts refute Florida's repeated intimation that end user charges have been designed as a regulatory straitjacket permitting no latitude or variation.

Apart from its claim of discrimination, Florida argues that fixed end user charges undermine the goals that the FCC sought to achieve. Pet. 22-26. Florida asserts that the charges, because they are fixed, are "regressive" and will necessarily undermine the FCC's goal of universal service (*id.* at 22-23); that the charges, by driving poor customers off the network, will drive up the cost that must be borne by heavy users, thus encouraging them to bypass the network and utilize less expensive alternatives (*id.* at 23-24); and that the result will be to "idle[ ] the system and encourage inefficiency." *Id.* at 24-25. These claims are unfounded.

The notion that fixed end user charges will encourage bypass has the matter backwards. The FCC demonstrated, in findings affirmed by the Court of Appeals, that the end user charges ultimately reduce the costs currently

[12] As noted, individual charges within the framework of the access charge plan are embodied in tariff filings which are open to challenge in conventional tariff proceedings under the Act. See, *e.g.*, p. 3 & n.5, above.

borne by heavy users who did not cause those costs; and this reduction in the costs that must be recovered through interstate per minute rates paid by heavy users will reduce their incentive to bypass the network. Pet. App. 44a-50a. These findings are amply supported by the evidence (*id.*), but even if they were debatable, this Court does not normally grant certiorari to review agency fact findings which do not, and indeed could not, present any conflict of law between the circuits.

Florida may be arguing in the alternative that fixed end user charges, alleged to be "regressive," would bear heavily upon poor residential customers. The FCC has met this contention. Although it has found presumptively that cost causers should bear their own costs, the FCC has deferred end user charges for *all* residential customers until it has completed its current proceedings to devise exemptions for customers who could not afford even the minimal contribution now contemplated for residential customers. Florida cannot now complain in this Court about the design of such exemptions because that subject is still before the FCC in proceedings now being completed. See p. 3, n.5, above.

III. The Pendency of Other Disputes Over FCC Authority Does Not Support Certiorari Here.

The Wisconsin-Michigan and New York petitions cite a series of cases involving disputes over FCC authority, and they urge that the pendency of those cases warrants certiorari here. None of these cases presents the issues that are involved in this case and, whatever the basis for review in the cited cases, they cannot support certiorari here.

First, the recent decision of the Fourth Circuit, to which both the Wisconsin-Michigan and the New York petitions refer, has nothing whatever to do with access

charges.[13] The Fourth Circuit there affirmed a decision of the FCC involving depreciation of telephone plant. Specifically, the FCC ruled that, after it established methods of computing depreciation for telephone plant used interchangeably for interstate and intrastate service, the states could not ignore the FCC's determinations and require that the same property be depreciated on a different basis in state ratemaking proceedings.

The FCC's authority to determine depreciation rates and methods is conferred by Section 220 of the Communications Act, 47 U.S.C. § 220, which specifically empowers the FCC to establish binding depreciation rates and methods. The access charge decision does not depend on Section 220 or involve any conflict between federal and state methods of computing depreciation. The FCC here was concerned solely with structuring interstate rates to recover interstate costs in a manner consistent with federal policy goals. Nothing in the efforts of state parties to obtain review of the Fourth Circuit decision provides a basis for or supports certiorari in this case.

Second, the Wisconsin-Michigan petition refers to another controversy, now the subject of certiorari petitions or appeals in this Court, involving yet another, quite distinct issue. Pet. 8. That issue is whether FCC orders issued in rulemaking proceedings are enforceable in District Courts under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), or whether such District Court enforcement actions are restricted to adjudicatory orders. There is in fact a conflict on this issue of District Court

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[13] *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), *appeal pending*, No. 84-871, *and petition for certiorari pending*, No. 84-889.

enforcement authority between the First and Fifth Circuits,[14] and it may be this Court will conclude that this conflict justifies review.

However, the possibility of a grant of review of the First or Fifth Circuit decision on the Section 401(b) issue does not provide any basis for an argument that this Court should review the access charge decision by the District of Columbia Circuit. The conflict between the First and Fifth Circuits relates solely to the enforcement regime to be used in implementing valid FCC orders. That issue turns on the construction of Section 401(b) of the Act and the policies relevant to enforcement of agency orders. No enforcement question is presented in the present access charge case.[15]

Finally, Wisconsin-Michigan urge that certiorari should be granted to gauge the "impact" of the divestiture decree in the AT&T antitrust case[16] on the "correct apportionment of regulatory jurisdiction between federal and state authorities." Pet. 5, 12-13. See also New York Pet. 4. However, the petitions offer only one clearly articulated argument to connect the divestiture decree with the access charge decision, namely, the claim that the divestiture decree has converted the BOCs into connecting carriers under Section 2(b)(2) of the Act. Even if this

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[14] Compare *New England Tel. & Tel. Co.* v. *Public Utilities Comm'n of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for certiorari pending*, No. 84-900, with *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *appeal pending*, No. 84-870.

[15] Two other cases involving enforcement are cited by the Wisconsin-Michigan petition: *Cincinnati Bell Telephone Co.* v. *PUC*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984), *appeal pending*, No. 84-623, and *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483. Neither case involves access charges.

[16] *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C.), *aff'd mem.*, 460 U.S. 1001 (1983).

were true, and neither the FCC nor any court has so ruled, it would be irrelevant to the validity of the access charge plan; as shown at pp. 6-7, above, the FCC clearly has power to require all local telephone companies, including connecting carriers, to use reasonable and non-discriminatory interstate charges to recover interstate costs.

If the states are arguing that the divestiture decree provides a basis for reexamining generally the FCC's authority over the BOCs, the argument misconceives the proper timing and occasion for such review. After an antitrust decree has been approved and affirmed by the courts, its construction thereafter is properly litigated in concrete contexts where resolution has a demonstrated effect on the outcome of an individual controversy. In this case, none of the challenges made by the states to the access charge plan requires the construction of the anti-trust decree; there was no construction of that decree by the court below; and no issue of construction is properly presented on certiorari in this case.

The petitioners' resort to unrelated cases involving FCC authority, as an asserted basis for review of the access charge plan, is a confession of the weakness of their petitions in this case. This Court does not grant certiorari because the agency is engaged in numerous cases; it requires a showing that, in the particular case for which certiorari is sought, there is a conflict among the circuits or some other recognized basis for Supreme Court review. No accepted basis for certiorari has been established in *this* case either by the original NARUC and NASUCA petitions or by the three additional petitions that are addressed in this opposition.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

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